

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

JOHN E. JARVIS	:	CIVIL ACTION
	:	
v.	:	
	:	
GOVERNMENT OF THE VIRGIN	:	
ISLANDS, et al.	:	NO. 07-117

MEMORANDUM

Bartle, C.J.

February 12, 2009

Plaintiff John E. Jarvis has filed this putative class action against the Government of the Virgin Islands, the Virgin Islands Bureau of Internal Revenue, and Gizette C. Thomas in her official capacity as Director of the Bureau. He seeks refunds of the Virgin Islands personal use tax he and others have paid since July, 2003. The tax was assessed on "all articles, goods, merchandise or commodities brought into the Virgin Islands for personal use and valued ... over \$1,000." V.I. Code Ann. tit. 33, § 60 (repealed 2007). On July 25, 2007, this court held the tax to be invalid in Molloy v. Government of the Virgin Islands, ___ F. Supp. 2d ___, 2007 WL 2220480, *3 (D.V.I. July 25, 2007), as an unconstitutional burden on commerce into the Territory of the Virgin Islands since no similar tax existed on the use of such items purchased or obtained within the Territory.¹ Less

1. The Court of Appeals has ruled that Commerce Clause principles are implicit in the Territorial Clause of the Constitution. U.S. Const. art. IV, § 3, cl. 2; Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534-35 (3d Cir. 1993). The Territorial Clause states: "The Congress shall have Power to
(continued...)

than three months later, the Virgin Islands Legislature repealed the tax. Act of Oct. 10, 2007, No. 6969, § 12, Sess. Law, 173. In addition to refunds, Jarvis seeks declaratory and injunctive relief.

Before the court is the motion of the defendants to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and for insufficient process and insufficient service of process under Rules 12(b)(4) and 12(b)(5) respectively.

In reviewing this motion to dismiss for lack of subject matter jurisdiction, we accept the plaintiff's factual allegations as true. Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). To overcome a motion to dismiss for insufficient service of process, the plaintiff has the burden to show that he made proper service. Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993).

I.

The defendants first challenge subject matter jurisdiction due to the lack of a federal question under 28 U.S.C. § 1331. A claim "arises under" the United States Constitution or federal law where either comprises an "essential element" of the claim for relief. Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112 (1936). Jarvis alleges that the

1. (...continued)
dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

defendants collected the Virgin Islands personal use tax in violation of the Constitution and have refused to return the tax to him and others who paid it. He seeks to compel refunds to be made. The claim of Jarvis clearly presents a federal question.

The defendants next argue that the Tax Injunction Act bars the court from hearing Jarvis' claim. The Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Where it applies, the Act deprives a federal district court of subject matter jurisdiction. Bluebeard's Castle, Inc. v. Gov't of V.I., 321 F.3d 394, 397 n.5 (3d Cir. 2003). The Supreme Court has held that the Tax Injunction Act not only prohibits federal district courts from entering injunctions but also from issuing declaratory judgments holding state tax laws unconstitutional. California v. Grace Brethren Church, 457 U.S. 393, 411 (1982). As a matter of comity, federal courts are likewise barred from hearing constitutional challenges to state taxes under 42 U.S.C. § 1983 where the plaintiff seeks monetary damages or a refund. Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 116 (1981). Thus, district courts have no subject matter jurisdiction to entertain constitutional challenges to state taxes no matter what relief is sought.

The question before us is whether the Tax Injunction Act curtails the jurisdiction of this court sitting in the Virgin

Islands, which is a territory and not a state. See 48 U.S.C. § 1541(a). Our Court of Appeals has answered this question at least twice in the negative. It held in Pan American World Airways, Inc. v. Duly Authorized Government of Virgin Islands that the Tax Injunction Act is not applicable to the Virgin Islands. 459 F.2d 387, 390-92 (3d Cir. 1972) It stated:

There is no indication that Congress intended that the district court, in the exercise of either its federal question jurisdiction or its original Virgin Islands jurisdiction should be subject to the strictures of 28 U.S.C. § 1341 [the Tax Injunction Act]. Indeed no such notions of federalism as underlie limitations on the power of the federal district courts to enjoin certain state actions are applicable to the territories.

Id. at 391. The court reiterated this rule more recently in Bluebeard's Castle, Inc. v. Government of Virgin Islands which involved the assessment of real property taxes in the Virgin Islands. 321 F.3d at 396-97. The court declared "we have held that the Tax Injunction Act does not apply to the Virgin Islands." Id. at 397 n.5 (citing Pan Am., 459 F.2d at 391). It emphasized that Congress has sovereignty over United States territories with "broad power" under Article IV, Section 3, Clause 2 of the Constitution to govern them, even in the area of property taxation which is "local" in character. Id. at 397, 401. In this action, of course, we are not dealing with a tax local in character but with a personal use tax that imposed burdens in violation of Commerce Clause principles.

The defendants maintain that Pan American and Bluebeard's Castle are no longer controlling. They rely on the Court of Appeals' more recent decision in Edwards v. HOVENSA LLC, 497 F.3d 355 (3d Cir. 2007) to support their argument that the Tax Injunction Act deprives the District Court of the Virgin Islands of subject matter jurisdiction over this action. That diversity action involved not a tax dispute but the unconscionability under Virgin Islands law of an arbitration agreement between Edwards, a citizen of Massachusetts, and his prospective employer HOVENSA, a citizen of the Virgin Islands, to resolve a claim of Edwards for personal injuries. Id. at 357. Before reaching the merits, the court discussed the jurisdiction of the District Court of the Virgin Islands. Id. at 358-60. It explained that pursuant to the Revised Organic Act of 1984, the Virgin Islands Legislature in 1991 divested this court of concurrent original jurisdiction with the local Superior Court (previously the Territorial Court) over "purely local civil matters." Id. at 359. The Court of Appeals held, however, that this court still retained diversity jurisdiction and was bound by the doctrine established in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Edwards, 497 F.3d at 360-61.

Edwards does not help the defendants. It does not restrict this court's jurisdiction over federal question cases and makes no reference to Pan American, Bluebeard's Castle, or the Tax Injunction Act. Moreover, the Act, on its face, relates only to actions contesting state tax laws and not those

contesting territorial tax laws. The Act provides, as noted above: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (emphasis added). Nor is this court dealing here with a "purely local civil matter" as discussed in Edwards. The claim is for refunds of the personal use tax which directly and adversely affected commerce into the Virgin Islands.

The holdings of the Court of Appeals in Pan American and Bluebeard's Castle that the Tax Injunction Act is inapplicable to the Virgin Islands as a territory remain binding on this court. Accordingly, the Tax Injunction Act does not prevent us from adjudicating this action.

In a further challenge to subject matter jurisdiction, the defendants contend that sovereign immunity prohibits Jarvis from prosecuting this action. It appears that Jarvis seeks relief under 42 U.S.C. § 1983 for violation of Commerce Clause principles implicit in the Territorial Clause of the Constitution. See Polychrome Int'l Corp., 5 F.3d at 1534-35. The Supreme Court has held that such a claim is viable when a state tax is challenged: "[T]axpayers who are required to pay taxes before challenging a state tax that is subsequently determined to violate the Commerce Clause are entitled to retrospective relief that will cure any unconstitutional discrimination against interstate commerce during the contested

tax period." Dennis v. Higgins, 498 U.S. 439, 447 (1991) (internal quotations and citation omitted).² Section 1983 by its terms also encompasses conduct under color of any territorial law. Consequently, plaintiffs may seek declaratory and injunctive relief and also tax refunds under § 1983. Id. at 440, 447, 451.

In addition, contrary to defendants' position, plaintiffs do not first have to comply with the procedural requirements of the Virgin Islands Tort Claims Act in order to bring a § 1983 claim. Moorhead v. Gov't of the V.I., 556 F. Supp. 174, 177 (D.V.I. 1983); see V.I. Code Ann. tit. 33, §§ 3401-3416. Accordingly, the fact that Jarvis may have failed to do so does not deprive us of subject matter jurisdiction.

II.

Finally, the defendants assert that this court must dismiss this action because of insufficient process and/or insufficient service of process under Rules 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure. Rule 4(j) requires that a plaintiff suing "[a] state, a municipal corporation, or any other state-created governmental organization" serve the complaint and summons on "its chief executive officer," here the Governor of the Virgin Islands. Fed. R. Civ. P. Rule 4(j). Under Rule 4(m), a plaintiff has 120 days to complete service after filing a complaint, but this deadline is not absolute.

2. The Tax Injunction Act had no applicability because that action was initiated in a Nebraska state court. Dennis, 498 U.S. at 441.

Fed. R. Civ. P. Rule 4(m). The rule continues, "[I]f the plaintiff shows good cause for the failure [to serve within 120 days], the court must extend the time for service for an appropriate period." Id. District courts possess broad discretion when considering a motion to dismiss for insufficiency of process or service of process. Umbenhauer v. Woog, 969 F.2d 25, 30-31 (3d Cir. 1992).

Jarvis filed his complaint on October 26, 2007. Within 120 days of that date he served Gizette Thomas, Director of the Bureau of Internal Revenue, and Vincent Frazer, Attorney General. He did not serve the Governor until at least the 135th day because he believed that the Attorney General had accepted service on behalf of the Governor. Approximately two months after serving the Governor, Jarvis moved for enlargement of time to serve the summons and complaint. The magistrate judge granted the motion on July 2, 2008 and ordered that "service of the Summons and Complaint on Governor John P. de Jongh, Jr. on March 12, 2008, shall be deemed perfected, subject to any defenses that may be asserted by the defendant."

Our Court of Appeals has instructed that we use a lenient approach when insufficient service of process is the grounds for a motion to dismiss. As the court explained in Umbenhauer, "[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most,

quash service, leaving the plaintiffs free to effect proper service." 969 F.2d at 30.

Jarvis has served the Governor of the Virgin Islands properly. The defendants merely complain that he did so too late. The magistrate judge has properly granted his motion for enlargement of time. Jarvis has thus met his burden of showing that service was properly effectuated, and there is no prejudice to the defendants. Accordingly, we find no reason to dismiss the complaint under either Rule 12(b)(4) or 12(b)(5).

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

JOHN E. JARVIS	:	CIVIL ACTION
	:	
v.	:	
	:	
GOVERNMENT OF THE VIRGIN	:	
ISLANDS, et al.	:	NO. 07-117

ORDER

AND NOW, this 12th day of February, 2009, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendants, the Government of the Virgin Islands, the Virgin Islands Bureau of Internal Revenue, and Gizette C. Thomas, to dismiss this action is DENIED.

BY THE COURT:

<u>/s/ Harvey Bartle III</u>	
HARVEY BARTLE III	C.J.
SITTING BY DESIGNATION	